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THE PROBABLE OR THE NATURAL CONSEQUENCE AS THE TEST OF LIABILITY IN NEGLIGENCE.

The cases decided by the Supreme Court of Pennsylvania seem to indicate in a cursory reading that the measure of damages in actions of negligence differs from that in other torts.

The usual test of a negligent wrongdoer's liability for the results of his wrong in these cases is that announced by Paxson, J., in *Hoag v. R. R.*:¹ "The injury must be the natural consequence of the negligence—such a consequence as under the surrounding circumstances of the case might and ought to have been foreseen by the wrongdoer as likely to flow from his act."

This of itself would indicate that in such cases the wrongdoer's responsibility for the consequences of his act was to be restricted to his reasonable anticipations.

This is more nearly the measure of damages in contract than in torts other than negligence. In such torts the wrongdoer must answer for all the natural consequences of his wrong until the chain of cause and effect be broken by the intervention of some new, outside, independent force breaking the chain and diverting the consequences to some new and different end. "An efficient adequate cause being found must be considered the true cause, unless some other cause, not incident to it, but independent of it, is shown to have intervened between it and the result: Dixon, C. J., *Kellogg v. R. R.*²

The obligation is one imposed by law upon all members of the community, in order to protect their fellow-members from the injurious consequence of acts prohibited, because they invade some absolute right, or are of a class which usually causes damage to the person or property of such fellow-members. They in return receive similar protection from the usually injurious acts of others. Where such a

¹85 Pa. 293 (298).

²26 Wis. 223.

rule of conduct established by public policy for the good of all is violated, the wrongdoer should answer for all the consequence brought about by the working out of the injurious tendency of his wrongful act until the ordinary natural laws of cause and effect are diverted by some outside agency. The duty is imposed for the protection of the inherent common-law rights of the individuals forming the community; it is enforceable by a right of action, given not to the state to punish the wrongdoer, but to the injured party to recover for himself compensation for the loss resulting from the wrong. The question is not what should the defendant pay, but what should the plaintiff receive. It may be hard to mulct the wrongdoer in damages for results which the normal man would not anticipate, but it is more unjust that the person injured by the breach of a duty imposed for his protection should not recover for all the loss which has in ordinary course of nature been caused to him by the wrong, because the wrongdoer could not foresee the full effect of his act. Malice or evil motive may enhance the verdict by the recovery of punitive damages imposed as a punishment to the wrongdoer and a deterrent to others, although the principle is anomalous, but the loss to the plaintiff is as great, his right to recover should be as certain, if the loss be a natural result of the wrong, whether the defendant intended the whole damage to result or should have known it would occur, or could not possibly foresee the extent of the consequences of his act.

In contract, on the contrary, the rule is that a party can only recover for such injuries as usually, normally, customarily, are the result of the breach, or such as are rendered probable by reason of exceptional circumstances known to both parties, and in reference to whose existence the contract was made.

In contract no duty common to all is broken, no inherent right invaded; the obligation is self-assumed, the right self-created: they are obligations and rights created by the mutual consent of the parties in addition to those imposed or given by the policy of the law as necessary for the protection of all citizens generally. So there is no reason why the liability for a breach of such a duty, the invasion of such a

right, should be extended beyond those consequences normally and usually probable under the circumstances as known to both. If a party desire a fuller right of recovery than such usual consequences, he can either expressly stipulate for them, or can by calling to the other parties' attention any special facts rendering such results probable, make him liable for them. His destiny is in his own hands. He can increase by a word his obligation or his rights; he is entitled to no more than a reasonable man would anticipate obtaining; he assumes no obligations, either for performance or for compensation for non-performance, in addition to those normally probable according to the facts within his knowledge. How can a man be said to assume voluntarily a responsibility for what he could not have contemplated as likely to occur?

Certainty is the great desideratum in the law of contract. Parties to a contract must know what they are bound to do to make a good performance or to compensate for a bad; what they are entitled to receive either in performance or upon breach. Justice in individual cases must yield to this necessity of certainty.

Then, too, either the plaintiff never contemplated so remote a result as probable, and never intended or expected to acquire any right in respect to it, or knowing circumstances making such result probable, he did not disclose them, when notice would have given the right of recovery, to the defendant, either from carelessness or from a fear that the defendant would not be willing to assume so wide a possible liability for the consideration given.

True it is, as has been said, a party contemplates the performance and not the breach of a contract,³ but none the less a man would consider the extent of his possible liability for a breach which may be caused by some necessity, sorely against his will, as a very decisive factor in favor of or against his entering into a contract. The voluntary nature of both obligation and right, the necessity of encouraging business by imposing no liability, so wide as to frighten merchants from entering into contracts; the possibility of either party obtaining, *with* the other's consent, an indefinite

³ *Ehr Gott v. N. Y.*, 96 N. Y. 264.

extension of the liability for breach of all these things; the inadvisability of their obtaining such an extension without such consent, emphasize the propriety of a rule of damages in contract cases which would be totally inappropriate in action of tort.

Is there, then, in the nature of the duty to avoid injuring one's neighbor by negligence, any analogy to contractual obligation, anything foreign to the duty enforceable in all other actions of tort? Surely not; it is an obligation not assumed or created by the parties. True, no obligation arises until the party acts; but the duty is imposed upon him when he acts irrespective of any consent; it is a restraint placed upon his action when his acting has a probable tendency to injure his fellows. His action places him in a certain relation (it may even be one created by contract) to his fellow-citizens—to that relation the law attaches the duty of care.

Can any distinction be drawn between malicious, willful wrongs and those where intent is absent, which will justify different measure of damage in the two cases? It is true that tortious acts may be divided into those which are actionable: (1) without proof of special damage; (2) only upon such proof—the first being cases where some absolute right has been infringed, such as the right to the inviolable sanctity of one's person or property, the others being those acts forbidden because usually attended by probability of injury to the person or property of others.

In the first case, the duty is absolute to refrain from invading such sacred rights; in the second, no act is wrongful, unless the probability of injury to some determinate person or class of persons raises the duty as to those persons to refrain from such act, and no action can be brought until the probability of injury has culminated in damage actually sustained in consequence of the act.

In the first class of cases, the injury is generally intentional, though not always necessarily so; in the second, it is usually not intentional or willful. In neither is intention essential. In the first, it is the sanctity of the right which raises the duty to respect it; in the second, the probability of injury renders the act wrongful. If in the second class of cases a person intends injury to follow his act, as to him, the

injury is of course the probable result, though the average normal man would not regard it as such. In such a case as in cases of the first class there is no need to consider the reasonably probable effects of the act in order to raise the duty—the duty is clear, the violation absolute; all that remains is to apply the measure of damages so as to compensate the person injured for the loss he has sustained as the legally proximate (that is the natural) consequences of the admittedly wrongful act. This, however, is not the normal case of this class, and the very term negligence negatives the possibility of intentional wrong in negligence cases.

The law of negligence does not attempt to lay down or define any set definite standard of conduct applicable to all the affairs of mankind. It is in its very nature a compromise whereby the safety of the persons and property of the members of the body politic are to be guarded, as far as may be, without hampering unduly the transaction of business and the freedom of individual action.

The test is⁴ the conduct of the average reasonable man—not the ideal citizen, but the normal one.

So no one is bound to conduct his business with any regard to those who can be only possibly affected by the manner in which he carries it on; he owes a duty of care to those only whom the normal man should foresee that his lack of care might injure.⁵

Nor is any one bound, even as to such as may probably be affected by his acts, to take precautions to guard against every possible contingency; the standard of care to which he must conform is to take such, and only such, precautions as

⁴ Sometimes modified in practice by the necessities of the encouragement of enterprise beneficial to the community without however announcing any departure from the general theory.

⁵ While this is true, the converse of the proposition is not. The probability of injury from carelessness does not in every case raise the obligation to be careful. *Heaven v. Pender*, L. R., 11 Q. B. D. 503, opinion of majority of court. Brett, M. R., dissents. *Curtin v. Somerset*, 140 Pa. 70. It would seem that he who makes or supplies a chattel or real property divests himself of responsibility for its condition when he parts with the possession, control and use. The retention of any of these, however, continues the duty. *Elliott v. Hall*, L. R., 15 Q. B. D. 315; *Carson v. Godley*, 26 Pa. 111.

are reasonably sufficient to guard against those damages which may be anticipated as probably resulting from his actions.

If the position in which the defendant is situated as regards the plaintiff raises the duty of care, if the probabilities of the case demand the exercise of a certain measure of care, and that care be not taken, then the defendant, if his default has caused injury, must answer for the plaintiff's loss sustained as a legal consequence. Shall he, because the existence of the duty, the failure to take the required care, which is the fact of his wrongdoing, is to be measured and decided according to the reasonable anticipations of the normal man, restrict also his liability for the effects of an act now shown to be wrongful by the application of the same standard?

Reason, justice and authority⁶ alike answer this question in the negative. The rule in England is best expressed by Blackburn, J., in *Smith v. R. R.*⁷ bottom of page 21: "If negligence be once established it would be no answer to say it did much more damage than was expected"; and again: "What a person may reasonably anticipate is important in considering whether he has been negligent."

In *Sharp v. Powell*,⁸ a plaintiff was properly nonsuited because it was shown that the defendant could not have foreseen that his act, though a breach of a city ordinance, would probably affect the plaintiff in any way; he had violated a city ordinance,⁹ but no duty owed to the plaintiff; while in *Clark v. Chambers*,¹⁰ the act being admittedly wrongful toward the plaintiff, he was allowed to recover, though the wrong took effect in injury in a manner exceedingly difficult for any man to have foreseen.¹¹ In

⁶England, *Clark v. Chambers*, L. R., 3 Q. B. D. 330; Blackburn, J., *Smith v. R. R.*, L. R., 6 C. P. 14 bot. of p. 21; Federal Courts, *Kellogg v. R. R.*, 94 U. S. 469; New York, *Ehrgott v. N. Y.*, 96 N. Y. 264; Mass., *Hill v. Winsor*, 118 Mass. 251; Wis., *Kellogg v. R. R.*, 26 Wis. 223.

⁷L. R., 6 C. P. 14.

⁸L. R., 7 C. P. 253.

⁹As in *Fairbanks v. Kerr*, *infra*.

¹⁰L. R., 3 Q. B. D. 330.

¹¹See *Mr. Bevan's* admirable treatise on Negligence. He it is who first drew attention to the different rule of cause and effect applicable

Ehrgott v. N. Y.,¹² the defendant's counsel advanced the rule in *Hoag v. R. R.* in almost exact words, but it was rejected by the court as a test where the city was proven to be in default. C. J. Dixon's statement of the Wisconsin rule in *Kellogg v. R. R.*¹³ is quoted *supra*.

In *Hill v. Winsor*,¹⁴ Colt, J., thus states the Massachusetts rule: "This" (that defendant ran into a wharf, when he might have foreseen injury in some form to the plaintiff therefrom) "constitutes negligence, and it is not necessary that the injury in the precise form should have been foreseen. It is enough that it *now* appears to have been the natural and probable consequence."¹⁵ The line is drawn sharply between foresight and "hindsight." The existence of negligence is determined by the probabilities ascertainable at the time—the probabilities after the event settle how far the liability for it extends. Is it not a contradiction in terms to say that a thing so improbable that it could not be reasonably foreseen may become probable afterwards, because it does occur? It is natural, if it occurred in the ordinary course of nature, animate and inanimate, but it is not probable, unless it could have in advance been predicted as likely to occur.

It would seem that this practically amounts to a statement that the existence of the duty, the measure of care, in a word, the fact of negligence, is to be judged by the standard of the reasonable anticipation of the normal man as it appeared to him when he acted, the liability for such negligence by the test of the natural consequence of his wrong. The jury must look at the circumstances existing to the defendant's knowledge, to see whether he should have expected the probability of injury to the plaintiff by reason of the act or omission alleged to be negligent. Once having to the existence of negligence and the liability for the consequences thereof, between probable and natural consequences.

¹² 96 N. Y. 264.

¹³ 26 Wis. 223.

¹⁴ 118 Mass. 251.

¹⁵ Practically the same view is taken by Sir Frederick Pollock in his valuable treatise on the Law of Torts: "The kind of harm which in fact happened might have been expected, though the precise manner in which it happened was determined by an extraneous accident." P. 45.

determined this, they are to look, not at the facts as they then existed, but at what has since happened, and then to say whether the injury complained of was natural or exceptional, the result of the orderly working out unassisted of the injurious tendencies of the wrong, or whether it was the effect of some outside force which has utilized the conditions created by the wrong, but has utilized them to bring about some new and different result.

In a word, to determine the fact of negligence, reasonable probability of injury is the test; to determine the extent of liability—it is the unbroken chain of natural cause and effect. To recapitulate: To constitute actionable negligence there must be: (1) A duty to the plaintiff to observe care. This depends upon the probability of injury if care be not taken. (2) A standard of care not observed (constituting the breach). This again depends upon the anticipation of probable danger. (3) Injury suffered in consequence. This, it is submitted, must be judged by the rules governing responsibility for the effect of a breach of any obligation imposed by law and not assumed voluntarily by the parties.¹⁶

Now, in reading negligence cases it is necessary to remember that if the plaintiff fails in establishing any one of these elements he must lose.

If he fails to offer evidence capable of sustaining an inference in his favor as to any one of them he is non-suited; and it will be found that in the decisions these three elements are not properly distinguished and separated; they are grouped, as it were—if the evidence fails to support any of the three, it is simply stated that there is not sufficient evidence of negligence legally the cause of the injury complained of.

So a rule proper as to the existence of the duty, or the

¹⁶ The relation out of which the duty springs, to which the law attaches the obligation because of the probability of injury, may be created by a contract voluntarily entered into; but it is the law which imposes the obligation, not the parties who create it. A person buys a railroad ticket (a contract by the company to carry him); he thereby becomes a passenger for hire when he entered the train—the duty to carry safely then attaches to the relation of carrier and passenger, and is an obligation imposed by law, and of extraordinary stringency because of the ultra-hazardous nature of the business.

measure of care, is often applied as the test for the extent of the liability, but in such case with additions or qualifications which, while practically conforming to the ordinary measure of damages, in other classes of torts, destroys its value as a test for determining those questions to which alone it should be applied.

In *Haverly v. R. R.*,¹⁷ Mitchell, J., alludes to a most potent source of confusion in the Pennsylvania cases, *i. e.*, that in nearly similar cases "different results are reached not (depending on) any different view of the law, but of the facts, and on the application of the familiar doctrine that where a plain inference is to be drawn from undisputed facts, the court will decide it as matter of law."

The court does not, however, decide it by the application of fixed legal standards capable of definite enunciation,¹⁸ but by the exercise of their ordinary knowledge, reasoning, and, above all, common sense, just as the jury, when the facts are disputed, upon finding the facts, by the same process, draw such further inferences. In truth it is not a matter of law at all, nor decided as such, no matter who decides it; it is pure matter of fact, ascertainable by the ordinary powers of the ordinary man, and as such, by whomsoever decided, liable to the same errors and inconsistencies. In other jurisdictions, even where the primary physical facts are undisputed, such inferences of fact, the existence of a duty, the standard of care required, and the casual connection between the wrong and the injury, are left to the jury, not merely where the inference is not "plain," but wherever more than one inference could reasonably be drawn from the evidence. Where there is evidence from which the jury might draw one of two inferences, even though the judge thinks one much the better, it is for them to say which they shall draw. If the evidence is such that only one inference can fairly be drawn by any process of reasoning, so that a contrary finding would be mere guesswork, the result of

¹⁷ 135 Pa. 50 (58).

¹⁸ Without a proposition or rule which can be enunciated or predicated, there can be no rule of law; a rule of law can always be predicated in terms. Brett, J. (afterwards Lord Esher), *Bridges v. R. R.*, L. R., 7 E. and F. App. 213, p. 233.

prejudice, the case is not allowed to go to the jury, but is decided by the court in accordance with the only sole permissible inference.

Whether the evidence is patient of two inferences is itself a preliminary question of fact for the court; if it be not, it is a rule of law that the case must be withdrawn from the jury.

If, in Mr. Justice Mitchell's statement, a "plain inference" means one which the court strongly thinks should be drawn, the rule encroaches dangerously on the province of the jury; if it means that it is the only permissible inference, it has often been disregarded by the Pennsylvania courts, higher and lower alike. This article is concerned with ascertaining, if possible, what rules of law have been applied as tests in certain classes of cases, not with criticising and reconciling all decisions of the court upon matters of fact with all those inconsistencies and vagaries inherent in the decision of such questions.

Often the court has held as so-called "matter of law" that certain things do or do not constitute an independent intervening agent, or that under certain circumstances a reasonable man would or would not expect certain consequences of his act. Decisions on such points are vital to the parties and interesting to the profession as indicative of the court's probable opinion in future similar matters of fact; but it is the effect ascribed to the existence or non-existence of such intervening cause or reasonable expectation, when ascertained, which establish the rule of law, the standard and test of duty and liability.

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[*To be continued.*]